plaintiff to forebear from suing the first defendant for the said amount already due.

Counsel for the plaintiff submitted that the agreement between the plaintiff and the second defendant was partly in writing and partly oral and that the plaintiff was entitled to give evidence of the oral part of the agreement. Counsel stated that he relied on proviso (b) of section 92 of the Evidence Act which reads as follows:—

"92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that —

(a) xxx xxx xxx

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;"

Counsel for the plaintiff submitted that this was an extremely informal contract; that the terms were not fully set out in the letter of 17th August 1966; that proviso (b) to section 92 was therefore applicable; and that the contract being partly oral and partly in writing, oral evidence was admissible to prove the oral part of the agreement.

Counsel for the second defendant objected to the admission of oral evidence to vary the terms of the contract as set out in the letter of 17th August 1966. Counsel submitted that proviso (b) to section 92 was not applicable as there was no allegation of a separate oral agreement; that the plaintiff had not so pleaded; and that the plaintiff in his statement of claim relied entirely on the letter of 17th August 1966. Counsel contended that this was an agreement to answer for the debt of another person; that it was required to be in writing and that the letter of 17th August 1966 was the required document under the Statute of Frauds. Counsel submitted that there was nothing on the face of the said letter which required the court to look beyond it to determine the terms of the agreement and that this was not a case where extrinsic evidence could be allowed to go in. Counsel stated that the Evidence Act governed the admission of evidence and it must be strictly complied with.

In my opinion proviso (b) to section 92 of the Evidence Act applies only when there is a separate contemporaneous oral agreement as to a matter on which a document is silent. Proof of it may be given when such oral agreement is not inconsistent with or does not contradict the terms of the document. According to their statement of claim, it was not the plaintiff's case that there was a separate contemporaneous oral agreement. The plaintiff's case, as pleaded, was that "on that day (17th August 1966) the second defendant wrote a letter to the plaintiff in which it agreed that, if the plaintiff would forebear from suing the first defendant for the said debt and supply the first defendant with electrical goods and materials on credit it would be responsible to the plaintiff for the payment due to the plaintiff."

It will be seen that the plaintiff had relied entirely on the letter of 17th August 1966 and had not pleaded any separate oral agreement. In the circumstances the plaintiff was not entitled to tender oral evidence to prove that there was a separate oral agreement under which the second defendant was liable for payment of the plaintiff's claim for $13,780.72.

Furthermore, even if the second defendant had on the 17th August 1966 orally undertaken that in the event of the first defendant failing to pay the plaintiff the sum of $13,780.72 then due to the plaintiff, the second defendant would be responsible for the payment of the said sum, the said undertaking was unenforceable by reason of the Statute of Frauds which required such an undertaking to be evidenced by some memorandum or note thereof in writing signed by the second defendant because the undertaking was a promise to answer for the debt of another.

The plaintiff's total claim was for $22,805.79. The plaintiff had since the issue of the writ received payment of $9,024.57 being the amount due to it in respect of goods supplied to the first defendant after the second defendant's letter of the 17th August 1966. The said letter clearly did not support the plaintiff's claim for the balance of $13,780.72. As the plaintiff had no other documentary evidence and was not entitled to give oral evidence to prove that the second defendant was liable for the said sum of $13,780.72, the claim failed and was accordingly dismissed with costs.

Judgment for the second defendants.

Solicitors: *Chan Chow Wang & Co.; Laycock & Ong.*

X SHIPPING ENTERPRISES LIMITED OF HONGKONG v. THE COMPTROLLER OF INCOME TAX, SINGAPORE

[O.C.J. (Choor Singh J.) November 25, 1971]

[Singapore — District Court Appeal No. 13 of 1970]

Income Tax — Non-resident company — Charter business by — Tax on freight income — Casual sailings — Meaning of — Cessation of business — Proof of — Income Tax Ordinance (Cap. 166), s. 27 — Scope of — s. 35(5) — When applicable — s. 35(3)(d) — Failure to give required notice — Whether Comptroller has discretion to receive notice out of time — Whether court has such discretionary power.

The appellants, a company incorporated under the laws of Hong Kong, commenced the business of a charterer in Singapore in November 1964. It was not in dispute that there were six continuous sailings up to August 1965 and two further sailings on February 4, 1967 and May 3, 1968. In November 1967 the Comptroller of Income Tax came to know of the business activities of the appellants. On August 14, 1968 the comptroller raised assessments for the years of assessment 1964, 1965 and 1966 on the freight income received by the appellants during the period extending from November 1964 to August 1965 for the years ending December 31, 1964, December 31, 1965 and December 31, 1966. The income of the appellants was ascertained in accordance

with the provisions of section 27(c) of the Ordinance and the assessments were raised in accordance with the provisions of section 35(3) of the Ordinance. It was argued on behalf of the appellants that the application of section 35(3) was erroneous; that the appellants were liable to summary taxation under section 27(c) on actual earnings in the three years in question; that the appellants' business having ceased in 1965, the provisions of section 35(5) should have been applied and that in any event the sailings in 1967 and 1968 were casual sailings and therefore no tax was payable in respect of them by virtue of the provisions of section 27(d) of the Ordinance.

Held: (1) section 27 of the Income Tax Ordinance prescribes two methods of ascertaining income on which tax is payable in the case of a non-resident person who carries on the business of shipowner or charterer. It does not provide for levying summary taxation. There is no provision in the Ordinance for summary collection of tax similar to that laid down in the Indian Income Tax Act. The provisions of section 35(3) of the Ordinance were applicable and were correctly applied by the comptroller;

(2) there was no evidence that the charter business of the appellants had ceased at the end of 1965 and the appellants were therefore not entitled to invoke the provisions of section 35(5) of the Ordinance;

(3) as the appellants' business had not ceased in 1965, the sailings in 1967 and 1968 were not casual sailings within the meaning of section 27(d) of the Ordinance;

(4) the appellants having failed to give in due time the required notice under section 35(3)(d) of the Ordinance, they lost their statutory right to request that their statutory income both for the second year and the third year shall be the income of the respective years of assessment. Neither the comptroller nor the court had any discretionary power under the Ordinance to allow the appellants to exercise their option under section 35(3)(d) notwithstanding that they had failed to give the required notice within time;

(5) the provisions of sections 27 and 35 were properly construed and applied by the comptroller in this case and the appeal must therefore be dismissed.

INCOME TAX BOARD OF REVIEW APPEAL.

P. Selvadurai for the appellants.

Cheah Cheng Hoe (Legal Officer) for the respondent.

Cur. Adv. Vult.

Choor Singh J.: This is an appeal against the decision of the Income Tax Board of Review and requires a decision on the true meaning and scope of section 27 of the Singapore Income Tax Ordinance (Cap. 166).

The facts are these. The appellants, a company with limited liability incorporated under the laws of Hong Kong, commenced the business of charterer in Singapore in November 1964. It is not in dispute that there were six continuous sailings up to August 1965 and two further sailings on 4th February 1967 and 3rd May 1968. Some time in November 1967 the Comptroller of Income Tax came to know of the business activities of the appellants. On 14th August 1968 he raised assessments for the years of assessment 1964, 1965 and 1966 on the freight income received by the appellants. The appeal is in respect of the notices of assessments for the years I have mentioned.

By notices of assessment dated 14th August 1968 (Ref. C8472/68B); (C8472/68C); and (C8472/68D) for the years of assessment 1966, 1965 and 1964 respectively, the Comptroller of Income Tax assessed the appellants on the freight income received by the appellants during the period extending from November 1964 to August 1965, for the years ended 31st December 1964 to August 1965, for the years ended 31st December 1964, 31st December 1965 and 31st December 1966.

To make the matter clear I shall set out the relative positions taken by the Comptroller of Income Tax and the appellants in this dispute.

STATEMENT OF TAX

Year of assessment	Tax as assessed by Comptroller	Tax according to appellants based on assessment on actual income
1964	$ 6,550.80	$ 6,550.80
1965	27,832.00	21,281.00
1966	21,281.20	nil
	$55,664.00	$27,831.80

The comptroller maintained that the total amount of tax payable was $55,664 while the appellants maintained that they were liable for tax in the sum of $27,831.80 only. Their contention was that they should be assessed on their actual income in the years in question. They maintained that they were not liable for any tax in 1966 because they had no income in that year.

The appellants appealed to the Income Tax Board of Review but their appeal was dismissed. They now appeal to this court on three grounds:

"(1) Having found that there were six 'continuous sailings' up to August 1965 no sailings in 1966; one sailing on the 4th February 1967 and one sailing on the 3rd May 1968 the said board erred in law and failed to correctly apply section 27 of the Income Tax Ordinance (Cap. 166) to the facts so found. The said board further erroneously treated the isolated sailings in 1967 and 1968 as part of the 'continuous sailings' that ended in August 1965. The board should have treated the said isolated sailings of 1967 and 1968 as casual sailings within the meaning of section 27(d) of the said Ordinance.

(2) On the facts so found by the said board the said board erred in law in failing to apply the cessation provisions of section 35(5) of the said Ordinance.

(3) The said board also failed to give any or any proper significance to the advice given by the comptroller to the appellants that no tax would be payable unless the sailings were continued on a regular basis and to the consequent late assessments raised by the comptroller for the first time in 1968 in interpreting section 35(3)(d) of the said Ordinance."

Counsel for the appellants submitted that section 27 of the Income Tax Ordinance had not been correctly applied by the comptroller to the facts of this case. Counsel's first contention was that in raising assessments in this case the comptroller should have acted under section 27(c) without invoking section 35(3) of the Ordinance. Counsel argued that the summary assessment under section 27(c) was in substitution for the regular method of assessment laid down in the Ordinance. Counsel maintained that because of the nature of the business and the summary manner of assessing income laid down in section 27(c), there was no need to look at the scheme of the Ordinance. Counsel submitted that the application of section 35(3) of the said Ordinance in this case was erroneous. Counsel cited section 172 of the Indian Income Tax Act in support of his submission and argued that the intention of section 27(c) of our Ordinance is the same

as that of section 172 of the Indian Act. Counsel claimed that summary assessment was contemplated in substitution for the regular method of assessment.

Counsel for the respondent submitted that section 27 of the Ordinance merely laid down the method of ascertaining income; that two methods were laid down and that the assessments in this case were correctly raised by the application of section 35(3) of the Ordinance.

In my opinion the opening words of section 27 clearly support the submission of counsel for the respondent. The section lays down two methods of ascertaining income on which tax is payable in the case of a non-resident person who carries on the business of shipowner or charterer. There is no provision in the Singapore Income Tax Ordinance for summary collection of tax similar to that laid down in section 172 of the Indian Income Tax Act. The comptroller's application of section 35(3) of the Ordinance to the facts of this case was therefore correct.

The next submission of counsel for the appellants was that the business of the appellants came to an end in 1965; that there were no sailings in 1966; that there were isolated single sailings in the years 1967 and 1968 and that therefore the provisions of section 27(d) of the Ordinance should have been applied by the comptroller. Section 27(d) reads as follows:—

"(d) where the comptroller decides that the call of a ship belonging to a particular non-resident shipowner or charterer at a port in Singapore is casual and that further calls by that ship or others in the same ownership are improbable, the provisions of this section shall not apply to the profits of such ship and no tax shall be chargeable thereon."

No evidence of the cessation in 1965 of the appellants' charter business was put before the board by the appellants. There is nothing on record to indicate that the charter business of the appellants ceased in 1965. The cessation of business is a question of fact. If in fact the appellants' charter business had ceased at the end of 1965 they should have no difficulty in proving it. The burden of proof was on the appellants. On the evidence before the comptroller it could not be inferred that the charter business of the appellants had ceased at the end of 1965. There was literally not a single bit of evidence that anything whatever was done in 1965 which pointed to a permanent discontinuance of the charter business. There was no material upon which the comptroller could take the view that the appellants did. In my opinion the comptroller was right in coming to the conclusion that the sailings in 1967 and 1968 were not casual within the meaning of section 27(d) of the Ordinance.

The second ground of appeal is based on section 35(5) of the Ordinance which reads as follows:—

"(5) Where a person permanently ceases to carry on or exercise a trade, business, profession, vocation or employment, his statutory income therefrom shall be —

(a) as regards the year of assessment in which the cessation occurs, the amount of the income of that year;

(b) as regards the year of assessment preceding that in which the cessation occurs, the amount of income as computed in accordance with the foregoing subsections of this section, or the amount of the income of that year, whichever is the greater, and he shall not be deemed to derive income from such trade, business, profession, vocation, or employment for the year of assessment following that in which the cessation occurs:"

Before the appellants can invoke section 35(5) of the Ordinance they must establish that their business ceased in 1965. There is no evidence on record to support the contention that the appellants' charter business came to an end in 1965. The appellants should have adduced evidence before the board that their business ceased in 1965. It was submitted on behalf of the appellants that the absence of any sailing in 1966 indicated that the charter business of the appellants had ceased at the end of 1965. I am unable to accept this submission. The absence of a sailing in 1966 does not warrant the inference that the business had ceased in 1965. Such absence may have been due to some other factor or factors. As stated earlier, the cessation of business is a question of fact and if in fact their charter business had ceased in 1965 the appellants would have had no difficulty in proving it to the satisfaction of the comptroller. In my opinion the appellants failed to establish that their business had ceased in 1965 and they were therefore not entitled to rely on section 35(5) of the Ordinance.

As regards the third ground of appeal, counsel for the respondent stated that the respondent did not dispute that such advice, as claimed by the appellants, was given to them by the respondent. Counsel submitted that the appellants being in the charter business should know what are regular sailings; that the six sailings could not be anything but regular sailings; that they should have realised that they were liable for tax and that they should have filed their tax returns.

Counsel for the appellants submitted that although the appellants had failed to give the required notice within two years after the end of the second year of their business, they should in the circumstances of this case be allowed to exercise their option under section 35(3) (d) of the Ordinance to have their statutory income both for the second year and the third year based on the actual income of the respective years of assessment. Section 35(3) (d) of the Ordinance provides as follows:—

"(d) the person carrying on or exercising the trade, business, profession, vocation or employment shall be entitled. on giving notice in writing to the Comptroller within two years after the end of the second year, to require that the statutory income both for the second year and the third year (but not for one or other only of those years) shall be the income of the respective years of assessment:"

Section 35(3) (d) gives an option to a taxpayer to give notice in writing to the comptroller within two years after the end of the second year as to how the taxpayer's statutory income shall be ascertained for the first three years. Counsel for the appellants submitted that the appellants should have been given the opportunity to opt as provided for in section 35(3) (d) of the Ordinance because the failure to give the required notice within time was due to the fact that the assessments were not raised until 1968.

In my opinion the difficulties of the appellants are of their own making. The comptroller having advised them that no income tax would be payable unless the sailings were continued on a regular basis, the appel-

lants ought to have known that they were liable to tax because the six sailings were undoubtedly on a regular basis. The appellants should have filed their tax returns and exercised their option within the period laid down in section 35(3)(d). The appellants not only failed to give the required notice but also failed to file their income tax returns which fact could be construed as an attempt to evade payment of income tax. The raising of late assessments was due entirely to the fault of the appellants in failing to file their tax returns. If the appellants' business activities in Singapore had not come to the knowledge of the comptroller in November 1967, the appellants, a Hong Kong company, would have got away without paying any tax at all. Under the circumstances the comptroller was in my opinion right in not acceding to the request of the appellants to be allowed to opt under section 35(3)(d) of the Ordinance. Furthermore, the appellants having failed to give the required notice in due time, they lost their statutory right under section 35(3)(d) to require that their statutory income both for the second year and the third year shall be the income of the respective years of assessment. In the circumstances, the comptroller in my opinion, had no discretion to allow the appellants to opt notwithstanding that they had failed to give the required notice within time. Nor has the court any such discretionary power under the Ordinance. In my opinion section 35(3)(d) of the Ordinance was properly construed and applied in this case by the Comptroller of Income Tax.

For the above reasons the appeal fails and is therefore dismissed.

Appeal dismissed.

Solicitors: *Rodyk & Davidson.*

MALAYSIAN REPORTS

KARUPPIAH v. PETALING GARDEN CO. SDN. BHD.

[A.C.J. (Mohamed Azmi J.) June 16 1971]

[Kuala Lumpur — Civil Appeal No. 4 of 1971]

Contract — Housing development — Booking fee for plot in building estate — Whether earnest money — Compensation — Contracts (Malay States) Ordinance, 1950, s. 75.

The plaintiff had paid a sum of $4,000 as deposit for a plot of land in a building estate. Subsequently the defendants asked the plaintiff to sign the agreement for sale but he did not do so. The plaintiff claimed a refund of the sum of $4,000. His claim was dismissed in the sessions court and he appealed to the High Court.

Held: (1) the deposit of $4,000 in this case was earnest money and therefore as the appellant was unwilling to enter into the main contract to complete the bargain, he could not claim a refund of the deposit;

(2) even if the $4,000 was not earnest money, the respondent was entitled to reasonable compensation under section 75 of the Contracts (Malay States) Ordinance, 1950

Cases referred to:-

(1) *Jagathesan* v. *Linggi Plantation Ltd.* [1969] 2 M.L.J. 253.

(2) *Ford* v. *Beech* (1848) 11 Q.B. 852, 856.

(3) *Shree Hanuman Cotton Mills & Anor.* v. *Tata Air Craft Ltd.* A.I.R. 1970 S.C. 1986 at p. 1997.

(4) *Fateh Chand* v. *Balkishnan Das* A.I.R. 1963 S.C. 1405.

(5) *Chiranjit Singh* v. *Har Swarup* A.I.R. 1926 P.C. 1.

(6) *Maula Bux* v. *Union of India* A.I.R. 1970 S.C. 1955.

(7) *Murlidhar Chaterjee* v. *International Film Co. Ltd.* A.I.R. 1943 P.C. 34.

CIVIL APPEAL.

V. K. Palasuntharam for the appellant.

Liew Meng Teck for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an appeal against the decision of the sessions court at Kuala Lumpur whereby the appellant's claim for the refund of $4,000 by way of deposit to the respondent company was dismissed with costs.

The following facts appear to be not in dispute. The respondent, a housing developing company, was the registered proprietor of a large piece of land comprised in Grant 5595 Lot 695 in the District of Kuala Lumpur. The company intended to develop the whole of the said land into a building estate known as "Happy Garden" Petaling Jaya, and by 1964 it had obtained approval for sub-division of the said land into housing lots in accordance with an approved layout plan. Although separate documents of titles to each of the sub-divided lots had not been issued by the State Government, the company proceeded to receive applications from the public to purchase the sub-divided lots as the company developed the land by phases and built houses thereon of varying types. On July 13, 1964 the appellant applied to purchase one of the sub-divided lots *viz.* Lot No. 459 with type "B" house in Phase IV, at the price of $49,720 sub-